



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 28, 2004

Ms. Lisa M. Mims  
General Counsel  
Texas Board of Professional Geoscientists  
P.O. Box 13225  
Austin, Texas 78711

OR2004-4406

Dear Ms. Mims:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202559.

The Texas Board of Professional Geoscientists (the "board") received a request for all correspondence concerning the requestor. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information other statutes make confidential. Section 1002.260 of the Occupations Code provides:

A statement made by a person who provides a reference for an applicant for a license under this chapter or provides any information compiled by or submitted to the board relating to an applicant is privileged and confidential and may be used only by the board or an employee or agent of the board who is directly involved in the application or licensure process. Confidential information under this section is not subject to discovery, subpoena, or other disclosure in any proceeding.

Occ. Code § 1002.260. This section makes confidential information that the board obtains in the application or licensure process but does not extend such confidentiality to information pertaining to complaints that the board receives regarding an individual who has already been licensed. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478

at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public).

You do not inform us, nor can we discern, whether the submitted information relates to applicants or to individuals who are currently licensed. Thus, to the extent the submitted information is maintained by the board in connection with the licensure of an applicant, it is confidential under section 1002.260 and must be withheld under section 552.101. To the extent the submitted information does not pertain to the licensure of an applicant, it is not confidential under section 1002.260 and may not be withheld on that basis.

To the extent the submitted information is not made confidential by section 1002.260, we will address your other arguments. You contend that complaint letters and letters of recommendation are excepted from disclosure under the attorney-client privilege encompassed by section 552.107 of the Government Code. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless

otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You contend that “[t]he complainant in this case functions as a representative of the Board in their capacity as a complainant” and that “[t]he recommender in this case functions as a representative of the Board in their capacity as a reviewer of the applicant.” However, you give no explanation for these contentions. Having considered your arguments and representations, we find that you have failed to establish that members of the public who make complaints or provide references to the board function as representatives of the board in the board’s capacity as either a client or an attorney. *See* TEX. R. EVID. 503(a)(2) (defining “representative of the client” as “(A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or (B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client”), (4) (defining “representative of the lawyer” as “(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or (B) an accountant who is reasonably necessary for the lawyer’s rendition of professional legal services”). Because you have failed to establish that the complaints or letters of reference are among privileged parties, they may not be withheld under section 552.107.

You also contend that the complaint letters are protected under section 552.111 of the Government Code. This section excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency” and encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Evidence. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. PROC. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial

chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

Having considered your arguments and representations, we find that you have failed to establish that the complaint letters at issue constitute "material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents" or "communication[s] made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents." Because you have failed to establish that the complaint letters constitute work product, they may not be withheld under section 552.111 on this basis.

In summary, to the extent the submitted information is maintained by the board in connection with the licensure of an applicant, it is confidential under section 1002.260 and must be withheld under section 552.101. To the extent the submitted information does not pertain to the licensure of an applicant, it is not confidential under section 1002.260 and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

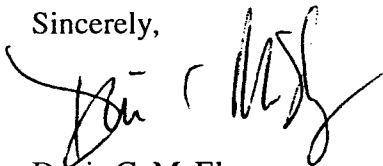
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/krl

Ref: ID# 202559

Enc. Submitted documents

c: Ms. Ada Lichaa  
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(w/o enclosures)